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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SIGNED PERSONAL CHECK NO. 730  
OF YUBRAN S. MESLE, DRAWN  
FROM BANK OF AMERICA ACCOUNT  
NO. 09672 67676 IN THE  
AMOUNT OF \$240,000.00 IN  
U.S. CURRENCY;

SIGNED PERSONAL CHECK NO. 1004  
OF YUBRAN S. MESLE, DRAWN  
FROM WELLS FARGO ACCOUNT  
NO. 3572585739 IN THE AMOUNT  
OF \$5,000.00 IN U.S. CURRENCY

SIGNED PERSONAL CHECK NO. 1040  
OF YUBRAN S. MESLE, DRAWN  
FROM BANK OF AMERICA ACCOUNT  
NO. 24547 67190, NO AMOUNT  
STATED;

\$197,031.14 IN U.S. CURRENCY  
SEIZED FROM BANK OF AMERICA  
ACCOUNT NO. 09672 67676 ON  
FEBRUARY 22, 2008;

\$1,598.21 IN U.S. CURRENCY  
SEIZED FROM WELLS FARGO BANK  
ACCOUNT NO. 3572585739 ON  
FEBRUARY 22, 2008.

Defendants.

Case No. 08-CV-0394-WQH(CAB)

RESPONSE AND OPPOSITION TO  
MOTION FOR JUDGMENT BY  
DEFAULT AND TO SET ASIDE  
CLERK'S DEFAULT PURSUANT TO  
RULE 55(c) OF THE FEDERAL RULES  
OF CIVIL PROCEDURE

Date: September 2, 2008

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OF CIVIL PROCEDURE

1 Yubran Mesle, the claimant in the above-captioned matter, by and through counsel,  
2 Richard M. Barnett, hereby files his Response and Opposition to the government's Motion for  
3 Judgment by Default and his Motion to Set Aside Clerk's Default entered in this case. He bases  
4 this motion on Rule 55(c) of the Federal Rules of Civil Procedure.  
5

6 **I**

7 **STATEMENT OF THE FACTS**

8 Claimant Yubran Mesle is the owner of the funds in the seized bank accounts  
9 (Defendants "D" and "E" in the Complaint for Forfeiture).

10 On November 8, 2007, Claimant's brother, Ata Dighlawi, entered the United States at  
11 the San Ysidro Port of Entry. In Mr. Dighlawi's vehicle were three checks written on bank  
12 accounts Claimant maintained in the United States. Customs agents seized the three checks at  
13 that time.

14 The first check was in the amount of \$240,000, written on Bank of America account  
15 number 09672 67676. The check was dated November 28, 2007. At the time the agents seized  
16 the check, this account had approximately \$197,031.14 in it. The second check was in the  
17 amount of \$5,000, written on Wells Fargo Bank account number 3572585739 and was dated  
18 November 10, 2007. At the time agents seized the check, the account had approximately  
19 \$1,598.21 in it. The third check was written on Bank of America account number 24547 67190  
20 and was blank in its entirety except for the signature line.

21 On November 9, 2007, Claimant learned from his brother the checks had been seized at  
22 the border. The following Monday, November 12, 2007, Claimant discovered that the funds in  
23 his bank accounts had been frozen as a result of the seizure.

24 On or about November 13, 2007, Claimant contacted a United States Customs agent he  
25 knew, Chris Cummings. Claimant informed agent Cummings of the situation regarding the  
26 seizure of the checks, and Agent Cummings told Claimant he would look into the matter. Agent  
27 Cummings explained he would contact the United States Customs agent responsible for the  
28 investigation and help to resolve the situation.

On or about November 14 or 15, 2007, Claimant spoke with United States Customs

1 Agent Glenn McDonald, the agent assigned to the investigation. Mesle explained to him the  
2 funds in Bank of America account number 09672 67676 had just been wired into Mesle's  
3 account on November 7, 2007, and provided a copy of a promissory note showing the source of  
4 the funds. (A copy of that promissory note is attached hereof as Exhibit "\_\_\_\_\_"). Agent  
5 McDonald told Mesle U.S. Customs would send him petition paperwork, for Mesle to fill the  
6 paperwork out, and Agent McDonald stated that the matter would be taken care of.

7 On or about November 15, 2007, Mesle received a Notice of Seizure from United States  
8 Customs and Border Protection (See Exhibit "B" attached hereto). That notice advised him of  
9 the seizure of "3 bearer negotiable personal checks (Bank of America checks #1040 and 730 and  
10 Wells Fargo Check #1004)." The notice explained that among various options other than  
11 "abandoning" the property, Mesle could petition Customs explaining why he was entitled to  
12 relief from forfeiture and/or elect to file a Claim and have the matter proceed to court.

13 Not being clear on exactly what papers were required to be returned from those sent by  
14 U.S. Customs, Mesle filed the Petition, Seized Asset Claim Form, and a currency transaction  
15 report that had been enclosed in the packet of information. (See Exhibits " ", " ", and " ").  
16 He also signed an Election of Proceedings form which had been sent in the package..

17 He forwarded all of the above-referenced documentation to United States Customs on  
18 December 6, 2007, or within approximately 21 days of his receipt of the Notice of Seizure from  
19 United States Customs. Mesle was told by a number of people that the petition process could  
20 take up to one year to conclude.

21 About one month after the seizure, Claimant again spoke to United States Customs agent  
22 Chris Cummings about the situation. Agent Cummings told Mesle he had spoken to Agent  
23 McDonald and had made a recommendation on Mesle's behalf, and that he would continue to  
24 speak to Agent McDonald and try to help.

25 Under federal law, the government must file a Complaint for Forfeiture within ninety  
26 days of receipt of a Claim. Title 18, United States Code, Section 983(a)(3)(A). U.S. Customs  
27 received Mesle's Claim on December 7, 2007 (see Exhibit "F"); therefore the Complaint was  
28 required to be filed no later than March 7, 2008. Up until this point, the funds in the bank



1 accounts (defendants "D" and "E") had not been seized. Apparently recognizing this significant  
2 deficiency, the government sought and obtained seizure warrants for the funds on February 21,  
3 2008. (See Exhibits "G" and "H" attached hereto.). Following the seizure of the funds in the  
4 bank account, and to this date, no Notices of Seizure pursuant to 19 U.S.C. 1607 were ever sent  
5 to claimant Mesle for the seized funds.

6 On March 3 , 2008, the government filed the Complaint for Forfeiture, seeking forfeiture  
7 not only of the three seized 'monetary instruments', but also for the funds in the two bank  
8 accounts that had been seized days earlier but for which seizure Mesle had received no notice.

9 Shortly thereafter, Mesle received the Complaint for Forfeiture in this matter. Because  
10 he was told the decision on his petition would take up to a year (and because he had received no  
11 notice of seizure advising him the funds in the account had been seized), he didn't understand  
12 that any further action was required in on his part insofar as responding to the forfeiture  
13 complaint. (See Exhibit "F" attached hereto, at paragraph 10.)

14 On June 9, 2008, a Clerk's Entry of Default was entered after no Claims had been  
15 received. Claimant was not informed of the Entry of Default by any entity including the  
16 government.

17 The first Claimant realized there was a problem was when he received the instant  
18 Motion for Judgment by Default, when the Government served him with a copy. Claimant  
19 promptly contacted his present counsel and engaged him to represent him in this matter.

20 On August 7, 2008, Claimant filed his Claim Opposing Forfeiture. Thereafter, his  
21 counsel attempted to resolve the matter of the pending motion for default with the government  
22 informally, but the government has refused to withdraw the motion.

23 It has always been Claimant's intention to pursue this case. Claimant diligently  
24 responded to all correspondence he received from U.S. Customs, and he was simply mistaken as  
25 to the fact that the filing of his petition did not in and of itself prevent the government from  
26 filing a forfeiture complaint in court. Although Claimant arguably was negligent in not filing a  
27 claim and responsive pleading upon receipt of the claim for forfeiture, this simple negligence  
28 should not preclude him from having an opportunity to have the default set aside so he may

1 contest the forfeiture on its merits.

## 2 ARGUMENT

### 3 I.

#### 4 **Defaults are Disfavored. The Court has Discretion to Set Aside the Entry of Default for** 5 **Good Cause Under Rule 55(c).**

6 Courts are leery of resolving disputes via default. Therefore, the general rule is that  
7 “default judgments are ordinarily disfavored. Cases should be decided upon their merits  
8 whenever reasonably possible.” *Eitel v. McCool*, 782 F.2d 1470, 1472 (9<sup>th</sup> Cir. 1986); accord  
9 *Tolson v. Hodge*, 411 F.2d 123, 130 (4<sup>th</sup> Cir. 1969) (“any doubts about whether relief should be  
10 granted should be resolved in favor of setting aside the default so that the case may be heard on  
11 the merits”). Efforts should be taken to avoid default judgment, as such a judgment “should be  
12 a sanction of last, not first, resort.” *Cassell v. Philadelphia Maintenance Co.*, 198 F.R.D. 67, 69  
13 (D. Pa. 2000).

14 The mechanism by which the Court determines whether to permit a party to avoid  
15 default and litigate the merits of the case is Federal Rule of Civil Procedure 55(c). The Rule  
16 states that “for good cause shown the court may set aside an entry of default, and if a judgment  
17 of default has been entered, may likewise set it aside in accordance with Rule 60(b).” In this  
18 case, there has been only an entry of default but not a judgment. That is significant because the  
19 standard is “more lenient” than in cases involving a party seeking to undo a judgment of default  
20 under Rule 60(b) [generally involving “mistake, inadvertence, surprise, or excusable neglect”  
21 under Rule 60(b)(1)]. *United States v. \$23,000 in United States Currency*, 356 F.3d 157 (1<sup>st</sup>  
22 Cir. 2004).

23 Because of the preference for avoiding default judgments, the district court enjoys  
24 “*discretion* [that] is *especially broad* where, as here, it is entry of default that is being set aside,  
25 rather than a default judgment.” *Mendoza v. Wight Vineyard Management*, 783 F.2d 941, 46  
26 (9<sup>th</sup> Cir. 1986) (emphasis added). As the Fourth Circuit has articulated it, there is an “extensive  
27 line of decisions” holding that Rule 55(c) “must be liberally construed in order to provide relief  
28 from the onerous consequences of defaults and default judgment.” *Lolatchy v. Arthur Murray*,

1 *Inc.*, 816 F.2d 91, 954 (4<sup>th</sup> Cir. 1987). In fact, a decision to set aside a default “is not an abuse  
2 of discretion unless the court is clearly wrong in its determination of good cause.” *Mendoza v.*  
3 *Wight, supra*, 783 F.2d at 946.

4 ***A. Mr. Mesle Qualifies for a Set Aside of the Entry of Default Based on the Three***  
5 ***Factors The Court Must Consider Under Rule 55(c).***

6 In the cases interpreting Rule 55(c), the courts are directed to consider three factors in  
7 determining whether the party seeking relief has established good cause: “(1) whether the  
8 defaulting party engaged in culpable conduct which led to the default, (2) whether the defaulting  
9 party has a meritorious defense, and (3) whether setting aside the default would prejudice the  
10 party who obtained it.” *Siemens Med. Solutions USA, Inc. V. Sequoia Techs.*, 2006 U.S. Dist.  
11 LEXIS 11267 (D. Ariz. 2006) (citing *Benny v. Pipes*, 799 F.2d 489 , 494 (9<sup>th</sup> Cir. 1986),  
12 amended by, 807 F.2d 1514, and *Mendoza v. Wight, supra*, 783 F.2d at 946). While the factors  
13 are disjunctive, and the Court therefore may deny a set aside motion based on a failure of proof  
14 on any one factor, “where timely relief is sought from a default . . . and the movant has a  
15 meritorious defense, doubt, if any, should be resolved in favor of the motion to set aside the  
16 [default] so that cases may be decided on their merits.” *Mendoza v. Wight, supra*, 783 F.2d at  
17 946.

18 In this case, Mr. Melse can establish that all three of the factors support his motion to set  
19 aside the entry of default, particularly in light of the liberal construction of the Rule required to  
20 assure that litigants get their day in court.

21 ***I. No Culpable Conduct by Mr. Mesle***

22 The first factor is whether the defaulting party engaged in “culpable conduct.” Culpable  
23 conduct “means actions taken willfully or in bad faith. . . . More than mere negligence is  
24 required.” *Cassell v. Philadelphia Maintenance Co.*, 198 F.R.D. 67, 69 (D. Pa. 2000). The  
25 Court may impute culpability from a defendant’s “reckless disregard for repeated  
26 communications” from the opposing party or the Court; however, it does not apply to merely  
27 “negligent and careless behavior.” *Id.*

28 As stated above, Mr. Mesle made every effort to assert his legal interest in the seized

1 property and to alert the government that he intended to fight against forfeiture. He contacted a  
2 Customs agents he knew within three days of the seizure, spoke to the case agent within four  
3 days of the seizure, and filed his paperwork with U.S. Customs within 21 days of their receipt  
4 and 28 days of the seizure of the checks. As time went on, he continued to query his contact at  
5 U.S. Customs, Mr. Cummings, as to what efforts would be required to have his property  
6 returned to him. To the extent that he failed to follow through and file the proper claim with the  
7 Court, that negligence should not be held to deny Mr. Mesle the opportunity to pursue his claim  
8 with counsel (particularly since the government will not be prejudiced by a set-aside; see *infra*).

9 To grant the relief requested, the Court need not find “excusable neglect” by Mr. Mesle.  
10 That standard is listed as one of the grounds for relief under the stricter Rule 60 requirement for  
11 vacating a *judgment* of default. See Fed. Rule Civ. Pro. 60(b)(1). Rule 55(b) motions are  
12 viewed more leniently. The case of is *Rasmussen v. Hutton*, 68 F.R.D. 231 (N.D. GA 1975)  
13 illustrative. In granting relief, the district court wrote:

14 In short, the Court does not find impressive defendant Hutton's reasons for being  
15 in default. But, when setting aside a default as opposed to vacating a default  
16 judgment, it is not always necessary that the neglect or oversight be excusable. . .

17 While neither defendant has presented well justified reasons for their actions, the  
18 defendants do not appear to have been in willful disregard of the processes of the  
19 Court. Viewing the totality of circumstances, the default should be lifted.

20 *Id.* at 235. Similarly, the court in *Cassell v. Philadelphia Maintenance Co.*, 198 F.R.D. 67, 69  
21 (D. Pa. 2000) granted the defendant’s motion to set aside an entry of default even though the  
22 defendant’s conduct was “negligent and careless.” *Id.* at 69 (“[D]efendant's conduct constituted  
23 negligence at worst and is not attributable to any intentional or willful disregard of the court  
24 rules or repeated communications from either the court or plaintiff's counsel”).

25 Mr. Mesle may have been negligent but did not act in intentional, willful disregard of  
26 repeated communication from the Court or the government. According to the government’s  
27 motion, the government sent notice twice to Mr. Mesle, i.e., the administrative Notice of Seizure  
28 on November 14, 2007 and the Complaint for Forfeiture in March of 2008. Mr. Mesle promptly

1 and thoroughly responded to the Notice of Seizure, providing more than was even required at  
 2 that stage of the proceedings. After it served him with the Complaint for Forfeiture, there is no  
 3 indication it took any further steps to forward him additional notice or determine why he hadn't  
 4 responded to the Complaint for Forfeiture, especially in light of his extensive filings in  
 5 response to the November 14, 2007 administrative Notice of Seizure. It never served him with a  
 6 copy of the Clerk's Judgment of Default, or attempted to contact him to see why he hadn't  
 7 responded to the Complaint for Forfeiture. *Cassel v. Philadelphia Maintenance Co.*, 198  
 8 F.R.D. 67, 69 (D. Pa. 2000)("[D]efendant's conduct constituted negligence at worst and is not  
 9 attributable to any intentional or willful disregard of the court rules or repeated communications  
 10 from either the court or plaintiff's counsel").

11 Here, Mr. Mesle made every effort he understood was required of him to protect his  
 12 rights in recovering his property. Forfeiture defense, and the morass of administrative and  
 13 judicial rules and requirements are a nightmare for most lawyers, let alone a layman to navigate.  
 14 Mr. Mesle cannot be faulted for having done what he was told to, i.e., file his petition and wait  
 15 for a response. His conduct certainly does not come close to an "intentional or willful  
 16 disregard" of the court rules, and thus demonstrates the absence of culpable conduct on his part.

17 ***ii. Mr. Mesle has a Meritorious Defense.***

18 A second factor for the Court's consideration of good cause is whether the litigant  
 19 seeking relief has a meritorious defense to the case. In seeking to set aside a judgment under  
 20 this factor, "all that is necessary to establish a 'meritorious defense' is a presentation or proffer  
 21 of evidence, which, if believed, would permit either the Court or the jury to find for the  
 22 defaulting party." *United States v. Moradi*, 673 F.2d 725, 727 (4th Cir. 1982). Here, Mr. Mesle  
 23 has a number of meritorious defenses to the forfeiture.

24 ***a. Failure to Comply with Title 19, United States Code, Section 1607***

25 First, defendants (d) and (e), the \$197,031.04 seized from Bank of America account  
 26 number 09672 67676 and \$1,598.21 seized from Wells Fargo Bank account number 3572585739  
 27 are not even properly before the court. The government failed to follow the proper procedures  
 28 in attempting to forfeit these funds because it failed to send out administrative notices of seizure

1 prior to instigating judicial forfeiture proceedings.

2 Title 19, United States Code, Section 1607 provides the statutory requirements for  
3 governmental forfeiture under these circumstances. Section 1607 provides in relevant part the  
4 following:

5 Section 1607. Seizure; value \$500,000 or less, prohibited articles, transporting  
6 conveyances:

7 (a) Notice of seizure  
8 If -

9 \* \* \*

10 (4) such seized merchandise is any monetary instrument within  
11 the meaning of section 5312(a)(3) of title 31;

12 the appropriate customs officer shall cause a notice of the seizure  
13 of such articles and the intention to forfeit and sell or otherwise  
14 dispose of the same according to law to be published for at least  
15 three successive weeks in such manner as the Secretary of the  
16 Treasury may direct. Written notice of seizure together with  
17 information on the applicable procedures shall be sent to each  
18 party who appears to have an interest in the seized article.

19 Here, the government seized the funds from the bank accounts on February 21, 2008 but  
20 never sent the required notice to claimant Mesle.<sup>1</sup> This failure by the government is particularly  
21 important for the following reasons. First, it would have notified him further action was  
22 required on his part. Second, he could have availed himself of the opportunity to seek  
23 administrative relief from forfeiture of the seized funds through a petition for remission or  
24 mitigation of forfeiture. When property has even seized, a claimant may seek an administrative  
25 determination of whether the forfeiture should be remitted or mitigation. That decision is made  
26 by U.S. Customs. See 19 C.F.R. §§171.11 and 171.12. As set forth in the attached Declaration  
27 of Richard M. Barnett, this avenue of relief is the preferred procedure in Title 31 cases because  
28 relief is often granted, in many cases, on more favorable terms than those in judicial forfeiture  
proceedings. However, once a complaint for forfeiture is filed, U.S. Customs is precluded from  
ruling on any petition filed by a claimant and the petition must be forwarded to the Department

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<sup>1</sup> Claimants have attempted to locate a published Notice of Seizure for the funds but do not believe any such notice was ever published as required by Section 1607.



1 of Justice.<sup>2</sup> Thus, by failing to properly notice Claimant of his right to file an additional petition  
 2 arising out of the seizure of the funds in the bank accounts, Claimant was denied his opportunity  
 3 to resolve the matter with U.S. Customs then and there.

4 By failing to comply with the requirements of Section 1607, the forfeiture of the funds  
 5 themselves is not even properly before the court.

6 **b. The Seized Checks were Not “Monetary Instruments” Subject to**  
 7 **Forfeiture**

8 A default judgment generally bars the defaulting party from disputing the facts alleged in  
 9 the complaint, but the defaulting party may argue that the facts as alleged do not state a claim.  
 10 *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392. Thus, well pleaded factual  
 11 allegations, except as to damages, are taken as true; however, necessary facts not contained in  
 12 the pleadings, and claims which are legally insufficient, are not established by default. *Cripps v.*  
 13 *Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir. 1987).

14 In its November 14, 2007 Notice of Seizure, U.S. Customs notified Mr. Mesle it had  
 15 seized ““3 bearer negotiable personal checks (Bank of America checks #1040 and 730 and  
 16 Wells Fargo Check #1004).” (See Exhibit “B”). The forfeiture statute upon which plaintiff  
 17 relies, Title 31, United States Code, Section 5317(c)(2), relies in turn on a violation of Title 31,  
 18 United States Code, Section 5316(a)(1)(B), which proscribes the failure to declare “monetary  
 19 instruments of more than \$10,000” brought into or taken out of the United States.

20 Claimant does not dispute that the definition of “monetary instruments” includes “bearer  
 21 negotiable instruments”. However, in this case, neither of the checks was “negotiable”. In the  
 22 case of the check written on the Bank of America account, the check was for \$240,000 while  
 23 there was only \$197,031.14 in the account. In the case of the check written on the Wells Fargo  
 24 Account for \$5,000, there was only \$1,598.21 in the account. As set forth in the attached  
 25 Declaration of Richard M. Barnett (see exhibit “J”), counsel has been advised by the operations  
 26

---

27  
 28 <sup>2</sup> “No action will be taken on any petition after the case has been referred to the  
 Department of Justice for institution of legal proceedings. The petition will be forwarded to the  
 Department of Justice.” 19 C.F.R. § 171.13(a)

1 managers at each of the branches at which these account were maintained, that each of the  
2 respective checks would have been considered “non-negotiable” based on non-sufficient funds.  
3 Thus, the checks were not “monetary instruments” within the meaning of Title 31, United States  
4 Code, Section 5316, and thus not subject to forfeiture.

5 **c. No “Substantial Connection” Between the Underlying Violation and**  
6 **Defendants “D” and “E”**

7 The government has failed to establish any connection between the offense which is the  
8 crux of the forfeiture action, i.e., failing to declare the monetary instruments, and the funds  
9 themselves. In other words, the ‘offense’ here was the failure to declare the instruments, and  
10 under the law, the instruments can be forfeited. However, it is a leap of logic to assert that the  
11 funds in the bank accounts are subject to forfeiture because they were property “involved in or  
12 property traceable to property involved in the November 8, 2007 violations of Title 31” as the  
13 government asserts in paragraph six (6) of the Complaint for Forfeiture.

14 Title 18, United States Code, Section 983(c)(3) requires in cases in which the  
15 government contends the property it seeks to forfeit was “involved” in the commission of a  
16 criminal offense, that the government establish there was a “substantial connection” between the  
17 property and offense. See *18 U.S.C. § 983(c)(3)*. See *United States v. 2000 Toyota Celica*, 2005  
18 U.S. Dist. LEXIS 41623 (9<sup>th</sup> Cir. 2005)( government must establish “substantial connection”  
19 between property to be forfeited and underlying criminal offense--government must establish  
20 that a nexus existed between the property and specified illegal activity sufficient to justify  
21 forfeiture).

22 Here, there simply is no “substantial connection” between the failure of Mr. Mesle’s  
23 brother to report he was carrying the three checks and the funds that were in the account. In  
24 other words, whether there were funds in the account or not did not make the crime of ‘failing to  
25 report’ the checks more likely or less likely, easier or more difficult to commit. Whether there  
26 were funds in the accounts was completely and totally irrelevant to whether Mr. Digwhali failed  
27 to report his possession of the checks.

28 Again, a default judgment generally bars the defaulting party from disputing the facts



1 alleged in the complaint, but the defaulting party may argue that the facts as alleged do not state  
 2 a claim. *Alan Neuman Productions, Inc. v. Albright*, 862 F.2d 1388, 1392. Thus, well pleaded  
 3 factual allegations, except as to damages, are taken as true; however, necessary facts not  
 4 contained in the pleadings, and claims which are legally insufficient, are not established by  
 5 default. *Cripps v. Life Ins. Co. of North America*, 980 F.2d 1261, 1267 (9th Cir. 1987). Here,  
 6 there are simply insufficient facts upon which to grant a default judgment as to defendants (d)  
 7 and (e), the funds in the two bank accounts.

8 **d. Mr. Mesle is an Innocent Owner of the Defendants (D) and (E)**

9 An innocent owner's interest in property shall not be forfeited under any civil forfeiture  
 10 statute. 18 U.S.C. §983(d)(1). A claimant is an innocent owner if he or she did not know of the  
 11 conduct giving rise to forfeiture. 18 U.S.C. Section 983(d)(2)(A)(I). As argued above, claimant  
 12 asserts there is no connection between the act of failing to report the checks at the border and the  
 13 funds in claimant's bank account insufficient to permit forfeiture of the funds in those accounts.  
 14 Should the court find otherwise, Mr. Mesle is still an innocent owner under 18 U.S.C. Section  
 15 983(d). As set forth in the Declaration of Yubran Mesle (See Exhibit "I"), he had no  
 16 knowledge his brother even had the checks when he crossed the international border, let alone  
 17 that he would fail to report them. Thus, he would prevail on his defense of innocent ownership.

18 **e. Any Forfeiture of the Entire Res Would Have Been An Excessive  
 19 Fine Under the Eighth Amendment**

20 In *United States v. Bajakajian*, 524 U.S. 321, 118 S.Ct. 2028 (1998), Customs inspectors  
 21 found Mr. Bajakajian and his family preparing to board an international flight carrying \$357,144  
 22 without filing the necessary currency report as required by 31 U.S.C. §5316(a)(1)(A), the exact  
 23 same statute involved in this case. The district court imposed a forfeiture of \$15,000. In holding  
 24 a forfeiture of the full \$357,144 excessive, the Court relied on the fact that Bajakajian's offense  
 25 was solely a reporting offense and that the district court found his violation to be unrelated to  
 26 any other illegal activities. Bajakajian did not fit into the class of persons for whom the statute  
 27 was principally designed: money launderers, drug dealers, and tax evaders. The court relied  
 28 heavily on the fact that the maximum penalty under the Sentencing Guidelines was a six month  
 sentence and a \$5,000 fine, which conformed that Bajakajian had a minimal level of culpability.

1 The court also noted that the failure to report affected only the government and that it caused no  
 2 loss to the public fisc. Had the crime gone undetected, the government would have be deprived  
 3 only of the information that \$357, 144 had left he country. Thus, there was “no articulable  
 4 correlation” between the \$357,144 and any government injury. *Id.* at 340, 118 S.Ct. at 2039.

5 Bajakajian has been followed by a number of cases upholding very limited forfeitures in  
 6 these currency reporting violations.; *United States v. \$100,348.00 in U.S. Currency*, 354 F.3ed  
 7 1110, 1121-24 (9<sup>th</sup> Cir. 2004)-\$10,000 forfeiture upheld where \$100,348 not reported);(See  
 8 *United States v. Beres*, 183 F.3d 22 (1<sup>st</sup> Cir. 1999) \$30,000 forfeiture where \$138,794 not  
 9 reported).

10 Here, the only information the government was deprived of by Mr. Mesle’s brother  
 11 failing to file a currency report was that his brother (Mr. Mesle) had written him two checks  
 12 here in the United States on his bank account at those banks. The holding in *Bajakajian* would  
 13 have severely limited any forfeiture of the res.

14 **iii. The Plaintiff United States Will Not Be Prejudiced by a Set Aside.**

15 The third factor is whether the government would be prejudiced by an order setting aside  
 16 the entry of default. The “fact that a plaintiff will have to litigate an action on the merits rather  
 17 than proceed by default does not constitute prejudice.” *Cassell v. Philadelphia Maintenance*  
 18 *Co.*, 198 F.R.D. 67, 69 (D. Pa. 2000). Prejudice only occurs if the set aside “results in the loss  
 19 of any relevant evidence or some other occurrence that tends to impair the plaintiff’s ability to  
 20 pursue the claim.” *Id.*

21 Here, there can be no suggestion that the government’s case would suffer as a result of a  
 22 set-aside. In fact, while Mr. Mesle filed his Documents with U.S. Customs within 21 days of  
 23 their receipt, the government waited until the 86<sup>th</sup> out of 90 days to file its complaint for  
 24 forfeiture.

25 **B. The Court has Discretion to Permit Late Filing of the Claim and Answer**

26 While it is true that the time for filing a claim to the seized property expired before Mr.  
 27 Mesle filed his claim, the Court maintains discretion to enlarge the time for filing, since the  
 28 thirty day deadline is modified by the clause, “[u]nless the court for good cause sets a different

1 time.” Supplemental Rule G(5)(a)(ii); *United States v. \$100,348.00 in U.S. Currency*, 354 F.3d  
2 1110, 1117.

3 In *United States v. \$100,348.00 in United States Currency*, the Court of Appeals for the  
4 Ninth Circuit held that “nothing in the Rule imposes a time limit on the exercise of the district  
5 court’s discretion.” *Id.* At the same time, “the court’s discretion is not unbounded. It should  
6 only exercise its discretion to grant additional time where the goals underlying the time  
7 restriction and the verification requirement are not thwarted.” *Id.*, citing *United States v. 1982*  
8 *Yukon Delta Houseboat*, 774 F.2d 1432, 1435-36 (9th Cir. 1985) (“1982 Yukon”).

9 The purpose of the time limit is to “force claimants to come forward as soon as possible  
10 after forfeiture proceedings have been initiated so that all interested parties can be heard and the  
11 dispute resolved without delay.” *1982 Yukon*, 774 F.2d at 1436. In this case, Mr. Mesle came  
12 forward immediately after the seizure of the checks and asserted his interest in the seized  
13 property by filing his claims to them.

14 The Ninth Circuit has identified certain non-exclusive factors for consideration in  
15 determining whether to consider an untimely claim: “(1) when the claimant became aware of the  
16 currency’s seizure, (2) whether the United States Attorney may have encouraged the delay, and  
17 (3), the decedent’s illness and death during this period which may have caused the estate’s delay  
18 in filing.” *United States v. \$100,348.00 in United States Currency*, 354 F.3d at 1117. Other  
19 circuits have listed additional factors, “not dissimilar,” based on the excludable neglect  
20 standard. *Id.*

21 Here, the factors supporting the setting aside of the entry of default also support  
22 extending the time for filing an answer and claim. Mr. Mesle took efforts to assert an interest in  
23 the property. He immediately filed all the papers he understood were required within twenty-  
24 one (21) days of notice from the government by the notice of seizure. The government didn’t  
25 even seize the actual funds until over three months after the checks were seized.

26 Mr. Mesle’s claim has been filed in this case. He urges the Court to permit him to file  
27 his responsive pleading at this time so that the case may be decided on its merits.

28 ///

## II.

## Conclusion

For the reasons stated above, the claimant, Yubran Mesle, urges the Court to grant his motion to set aside the clerk's entry of default and to allow the case to proceed based on his claim and anticipated responsive pleading..

Dated: August 19, 2008

Respectfully submitted,

s/ Richard M. Barnett

RICHARD M. BARNETT

Attorney for Claimant Yubran Mesle

**CERTIFICATE OF SERVICE**

I declare that:

I am a citizen of the United States and employed in the city of San Diego, CA. I am over eighteen years of age and not a party to the action. My business address is 105 West F Street, Fourth Floor San Diego, CA 92101.

On August 19, 2008, I served the following documents:

**Response and Opposition to Motion for Judgment of Default and Motion to Set Aside Entry of Default Pursuant to Rule 55(c) of the Federal Rules of Civil Procedure**

on the below attorneys by electronic filing:

Bruce Smith United States Attorney.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on August 19, 2008 at San Diego, CA.

/s Richard Barnett  
Richard Barnett